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JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 223.

THE UNITED STATES,
Appellant,
against
BITTER ROOT DEVELOPMENT COMPANY AND OTHERS,
Appellees.

Supplemental Brief for Appellees.

A. J. CAMPBELL AND
L. O. EVANS,
Solicitors and of Counsel for Appellees.

A. J. SHORES,
C. F. KELLEY AND
JOHN F. FORBIS,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, New York.

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AGAINST

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and others,
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No. 223.
Supplemental Brief for Appellees.

the above cause, owing to the distance of the residence e parties from the City of Washington and the fact that ounsel for the appellants did not file their brief until ary 2, when the cause was set for hearing in this , counsel for appellees were compelled to pre- their brief in advance of securing a copy of the for appellant. In the appellant's brief we find ast one proposition urged and argued at length first makes its appearance in this case in this and there are also some authorities cited as upon by appellant that were not before called to the tion of counsel, and in order to correct some statements t found in this brief in regard to these matters, coun- r respondents file this additional brief.

the main, the authorities cited by counsel for appellant, dition to those which are referred to in appellee's orig-

inal brief, require no comment beyond a general one that the cases correctly state the law upon the facts adjudicated but have no applicability to the matters and facts set forth in the bill of complaint in the case at bar.

The case of McMullen Lumber Co. v. Strother, decided by the Court of Appeals for the Eighth Circuit, reported in 136 Fed., Page 305 was, in short, a case where a party to a number of lumber contracts involving scattered and very extensive operations had, by means of fraud, rendering false accounts, and by corruption of a trusted agent of the other party to the contract, whose duty it was to see that the contract was fairly carried out, and by entering into conspiracy with the said agent, violated in practically every conceivable way almost every provision of each of these contracts. The situation presented was a most complicated one. The question of the betrayal of his trust by the confidential employee was involved, but the main ground upon which the Court sustained its equitable jurisdiction, while a rather novel and peculiar ground, that is, that the Federal Court, not having the power on the law side to send the case to a referee, as could have been done in the State Court under a statute, would atone for that lack of power by assuming jurisdiction in equity and sending the case to a master, has no possible connection with any of the facts or matters before this Court in the case at bar. After holding that the Court clearly had jurisdiction in equity, the Court went on and made a brief statement to the effect that jurisdiction was also shown on the ground that a trust could be declared in the property wrongfully acquired. This branch of the opinion is very brief and it is difficult to tell just what the theory of the Court was in this regard and difficult to tell as to what the legal rights and remedies of the parties were

in this case, but if the Court meant to hold that a party could follow money into property in the hands of a solvent party, who had acquired the money through a breach of contract or fraud, without any other ground for or necessity of interference in equity, the Court was clearly in error in its ruling.

The case of Broom Manufacturing Co. v. Guyman, 115 Fed., 112, also decided by the Circuit Court of Appeals for the Eighth Circuit, was simply a case where a party brought a suit to rescind on account of fraud a contract of sale of a large quantity of broom corn. It was alleged that the purchaser had no intention of paying for the same at the time the contract was entered into and had immediately thereafter transferred to a trustee all of its property, thus leaving the purchaser without property and, therefore, without means to meet the contract payment. A large amount of the broom straw had already been worked up into brooms, and portions of it had gone through the hands of two purchasers. The only possible remedy at law would have been an action in replevin and as a portion of the broom straw had been worked up into brooms and a portion thereof was in the hands of outside parties, the Court properly allowed the vendor to proceed in equity. We can see no possible relation of the decision in this case to the questions involved in the case at bar.

In the case of Angle v. Chicago & St. Paul Railway Company, a decision of this Honorable Court, reported in 151 U. S., page 25, in which the opinion was written by Mr. Justice Brewer, the only proposition that is claimed to have any bearing upon the question of trust before the Court in this case is the holding of the Court, and one that cannot be questioned, that a party deprived by fraud of his real property has a

clear right to proceed in equity and recover back that specific real property, and cannot be relegated in such case to his action at law for damages. The question arose under a creditors bill, but the Court at that stage of the case treated it, of course, as if the plaintiff was the company which had been defrauded of its real property. It is unquestioned that a party has a right in any case where wrongfully deprived of his real property to demand back that specific property. He cannot be made to accept money damages, or anything else in lieu thereof.

The above are the only cases presented upon the question of whether a trust situation is properly alleged in the bill in the case at bar that in our opinion could have even the slightest connection with or bearing upon the facts and matters stated in the bill of complaint in this action.

In this case mainly upon the proposition asserted by counsel for appellant that the bill can be maintained for the purpose of compelling an accounting by the defendants, and incidentally upon the trust proposition also, counsel for appellant in their brief set forth what they state is a permit typical of those issued to the Bitter Root Development Company briefly referred to in the bill of complaint herein, and from the conditions found in this typical permit, especially that providing for the filing of monthly statements by the Bitter Root Development Company, counsel contend that a contractual or fiduciary relation is established between the parties to this action and such a relation as would subject the defendants to an accounting in this action.

Counsel for appellant complain that the Circuit Court of Appeals disposed of the question of their right to an accounting by treating the wrongs complained of as mere trespasses and torts, and that that Court entirely overlooked this provision in the permit by which the Bitter Root De-

velopment Company agreed to file monthly statements, and also the other conditions in the permit. It is not strange that no reference appears in the opinion of the lower court to this or any other special condition contained in these permits, as no question under the permits was presented either by the bill of complaint or by the briefs of counsel or upon the oral argument. In fact this contention and any contention as to the permits or their nature, is first made, and first heard of in the brief of the Government filed in this cause on January 2 of this year.

But many reasons may be given which show clearly that this contention under these permits or any contention of merit in the bill by reason of these permits is clearly outside of the record in this case.

In the first place, nothing is claimed in the bill of complaint because of these permits or anything done in connection with the ground covered by the permits. The bill simply alleges that permits were issued to the Bitter-Root Development Company to cut timber upon certain small portions of the tracts described in the complaint. It was plainly not the purpose of the Government to charge that anything improper had been done under the permits or upon the ground covered thereby, but it was then alleged that these permits were used as a cloak under which the adjoining and other lands of the Government were despoiled. It is plain that the Government in this action was not complaining of the operations of the parties under these permits or as to the ground covered by them, but it is impossible to glean from the bill how the permits could have been used as a cloak in or as an aid to the denuding of other grounds. The Government had records of all these permits and the ground covered by them. The Government agent finding a party upon a certain tract of land or in a certain

neighborhood merely had to make reference to his record of permits to see whether the operations were upon the licensed ground or not.

In the second place, there is nothing in the bill of complaint, any allegation or statement, which would reveal to this Court the conditions of the permits referred to by counsel, or any other of the contents of the permits, and, therefore, no question can be raised thereunder. All that this Court knows from the pleading or can know is that some kind of a permit was issued. To hold, as contended by counsel for the appellant, that the Court takes judicial notice of the contents of these permits or any of them would be simply to hold that this Court takes judicial notice of every act performed in the Land Office or through or by the Interior Department. Under the statute of 1891, the Secretary of the Interior was given power upon such conditions and in such manner as he saw fit to issue permits to cut timber upon the public domain. Under this general grant, the Secretary no doubt issued thousands of such permits, and, possibly, no two of which were in the same form or contained the same conditions; and to hold that this Court can judicially know without evidence what was contained in each of those permits would be simply to hold that there being an Act of Congress giving the Land Office power to issue patents to mineral and other public lands, that this Court would take judicial notice of every patent issued and every contract made by the Land Department under those statutes and that it would no longer be necessary for a party in a civil suit to plead or prove the patent or contract by which he acquired title from the Government. It is a moot question, so far as our investigation goes, as to whether the United States Courts would even take judicial notice of the public and

general rules and regulations of the Land Office, at least one of the lower Federal Courts having held to the contrary, and there having been no decision of this Court upon this particular point, but it has never before even been contended, we believe, that any Court would go to the extent contended for in this cause.

In the third place, even if it be before the Court that the defendant, the Bitter Root Company, had taken these permits upon condition that it would file monthly statements, there is no claim in the bill of complaint that full, fair and complete statements and reports were not filed, showing all the transactions of any of the defendants under these permits, and in the absence of such an allegation, in the absence of a charge that the defendants have not voluntarily done everything required of them, what necessity is there for bringing the matter into any court?

In the fourth place, if it be conceded that counsel are correct and that this Court will take judicial notice of the contents of these permits, we submit that the Court must also take judicial notice of the statements and reports filed by the Bitter Root Company under these permits and will thus judicially know that all of these conditions have been at the times required fully complied with.

There are many other reasons that might be suggested for eliminating the question of permits from this case, for instance, first that the permits only ran to the defendant, the Bitter Root Company, which is not before this Court and has never been brought into the cause, and as the permits were by their terms not transferrable or assignable clearly none of the other defendants could claim any protection under the permits and incurred no obligation thereunder; and the further reason that it appears that these permits covered but a small and inconsiderable por-

tion of the ground described in the bill of complaint and no complaint is made as to that ground, clearly no obligation would arise as to any ground except that covered by the permits; and the further reason that these permits merely contain conditions under which the Bitter Root Company was licensed to do certain acts upon the ground in question, and created no obligation upon the defendant except that the permits must have been followed to have made its entry under the ground lawful, and that no relations of a fiduciary character were established by the giving and accepting of this permit. But, conceding that all of appellant's contentions as to these permits are correct, that they were issued, that their contents are before the Court, and still, as we submit we have plainly shown in our original brief, no necessity would exist for taking the controversy into a court of equity, as the Government has the clear legal right to disregard the permits, charge the defendants as willful trespassers upon the ground covered by the permits as well as that outside, and require the defendants to come into Court and assume the entire burden of proving the issuance of these permits and their compliance with each and every valid condition therein.

In appellant's brief upon the question of the right of the Government to maintain the cause in equity because one of the defendants, Mrs. Daly is sued as administratrix, the statement is made that the bill in this case specifically prays a discovery of assets by this administratrix. We have been unable to find any such prayer or request in the bill, but its mere presence in the prayer would add nothing, as there is no allegation which would support such a prayer, and on the contrary, the bill entirely negatives the propriety of any prayer for discovery of assets, or any discovery by the

administratrix, by clearly and repeatedly stating that the administratrix had at the time of the filing of the bill in her possession a sum six times that claimed by the Government as the outside extent of its damage in this case, which amount was in the hands of the administratrix ready and available to meet the claim of the Government when liquidated or any other proper claim against such funds.

It is also suggested by counsel for appellant that if this bill contained a prayer for injunction, no question of the right to proceed in equity could be raised. The mere prayer for injunction, of course, would avail nothing in the absence of the necessary allegations of fact to support such a prayer, and such allegations are entirely wanting in the bill in this case. Of course, if the proper allegations had been set forth in the bill, entitling the cemplainant to injunctive or any other equitable relief, and a proper prayer made, it would have to be conceded that the bill could be maintained, but in this case the bill contains nothing which would show that the Government claims that the trespass or waste is being continued, and in fact the bill shows that the transactions are passed and closed.

As must be apparent to this Court, it is impossible to ascertain from the bill in this cause how the remedy in equity would be more efficient than at law, but we submit that the real reason for the anxiety of counsel for appellant to proceed in equity, instead of prosecuting the law actions now pending, is frankly revealed by the statements of counsel contained on Page 42 of their brief and upon the oral argument. These objections are simply objections to the system of trial by jury generally, and, further, are due to an evident belief of counsel that they could more satisfactorily adduce their proof, especially from unwilling witnesses, in the convenient, and ac-

commodating practice had in equity before an examiner, and it seems to be mainly based upon the assumption that the witnesses produced would not tell the truth. As to the opportunity which would be given the complainant to examine the books and papers required, that opportunity would be as full and complete and in fact the same under Section 724 of the Revised Statutes as that which could be afforded before a master. It is presumed that the witnesses called will speak the truth, and none of these trivial objections can be taken seriously when weighed against the right of trial by jury guaranteed to these and all other defendants in similar cases.

We respectfully submit that the action of the lower Courts should be by this Court affirmed.

Respectfully submitted,

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